In the Court of Appeals of the State of Alaska

Michael Joseph Davis Jr.,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals No. **A-12441**

Order
Petition for Rehearing

Date of Order: **November 21, 2019**

Trial Court Case No. **3AN-12-12425CR**

Before: Allard, Chief Judge, and Mannheimer, Senior Judge,[*] and Suddock, Senior Superior Court Judge.[*]

Michael Joseph Davis Jr. seeks rehearing of our decision in his case, *Davis v. State*, 2019 WL 3216603 (Alaska App. July 17, 2019) (unpublished).

First, Davis contends that our description of Tomy Woo's testimony on page 6 of our memorandum opinion is inaccurate. Our memorandum opinion states "Tomy Woo testified that he saw Davis with his pants undone and his penis out." Davis asserts that Tomy never testified to seeing Davis's penis.

The record is as follows: On direct examination, Woo testified that "I looked out the window and Mr. Davis was standing there with his penis in his hands, his pants undone . . . ." [Tr. 166] On-cross examination, Woo again testified that Davis had "his hand in his pants and his penis," and that Davis "had his penis in his hand" and was pulling S.S.'s arm by the wrist toward Davis's crotch area. [Tr. 210, 211, 212] However, when questioned further, the following exchange took place:

[*]Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

Defense attorney: Okay. And didn't you also say that he was — that while he's doing this, he's rubbing his penis or something?

Woo: He was — his hand was moving and I assumed he was rubbing it.

Defense attorney: Okay. You never saw any part of [S.S.'s] body come into contact with Mr. Davis' genitals at all, right?

Woo: I did not see, no.

Defense attorney: Okay. And now his — so your testimony, if I understand it correctly, is that his hand is in his pants?

Woo: His pants were unbuttoned, unzipped, unbuckled and his — the shirt he was wearing was hanging down over and he had his hands in his pants, I'm assuming, with his penis in it.

Defense attorney: Okay. So you didn't actually . . .

Woo: Nothing else down there.

Defense attorney: . . . see his penis in his hand, but his hand was where his penis would be . . .

Woo: Yes.

Defense attorney: . . . fair to say? Okay.

Woo: Yes. [Tr. 213-214]

Given this record, we amend this sentence of our decision as follows: "Woo testified that he saw Davis with his pants unbuckled and undone, and his hand in the area where his penis would be."

Second, Davis contends that this Court erred when we found that he had inadequately briefed and thereby waived any challenge to the trial court's handling of his untimely motion for a new trial. We find no error. In his opening brief, Davis describes the issue presented as:

> Did the state present sufficient evidence that the attempted sexual contact alleged in Count 2 was "without consent," and "without regard to S.S.'s lack of consent," as required under Alaska law, and should Davis' post-trial motion for judgment of acquittal have been granted? [At. Br. 1]

As can be seen, Davis did not mention his post-trial motion for a new trial; instead, he mentioned only his motion for judgment of acquittal.

The argument headings in Davis's brief likewise refer only to the motion for judgment of acquittal:

> I. There Was Insufficient Evidence to Support the Verdict; a Judgment of Acquittal Should Have Been Granted as to Count 2. [At. Br. 5]
>
> A. The relevant evidence adduced at trial to support the conviction on Count 2 is insufficient. [At. Br. 6]
>
> . . . .
>
> C. The evidence is insufficient to show there was a "lack of consent," i.e., that the attempted conduct was "without consent." [At. Br. 17]
>
> D. The evidence is insufficient to show Davis acted "without regard to [S.S.'s] lack of consent." [At. Br. 18]
>
> E. The trial court erred in failing to grant the motion for judgment of acquittal. [At. Br. 19]

We acknowledge that there were a few instances in Davis's brief where he referred to the standard for granting a new trial rather than the standard for granting a judgment of acquittal. [At. Br. 19] But this appeared to be based on a confusion about the applicable standard rather than any attempt to challenge the trial court's handling of Davis's untimely motion for a new trial. If Davis had intended to raise the trial court's denial of his motion for a new trial as a separate claim of error, Davis would have needed to address the untimely nature of that motion, and he would have needed to put forward an argument as to why the trial court abused its discretion in denying the motion as untimely. But Davis's brief contained no such discussion.

The State's brief also demonstrates that the State did not perceive Davis to be raising any issue related to the motion for new trial. The State briefed only the judgment of acquittal issue that was squarely raised in Davis's opening brief. [Ae. Br. 23-24] Notably, Davis's reply brief does not argue that the State failed to respond to one of his arguments. Instead, the reply brief simply argues that the evidence was legally insufficient and that the trial court erred in failing to grant the motion for judgment of acquittal. [Reply Br. 2-4]

Given this record, we find no support for Davis's claim that he adequately raised the trial court's denial of his untimely motion for a new trial as a claim of error on appeal. We therefore reaffirm our position that this claim was not properly raised or adequately briefed.

Lastly, Davis contends that this Court erred in various ways in our legal analysis of his case. We find no merit to these claims.

Accordingly, IT IS ORDERED:

1. The petition for rehearing is GRANTED IN PART:

The first sentence of the last paragraph on page 6 is amended as follows:

> In addition, Tomy Woo testified that he saw Davis with his pants unbuckled and undone, and his hand in the area where his penis would be ~~penis out~~.

2. In all other respects, the petition for rehearing is DENIED.

Entered at the direction of the Court.

Clerk of the Appellate Courts

_____
Meredith Montgomery

cc: Court of Appeals Judges
Central Staff
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